1967

Marvin Joe Reeves v. State of Utah : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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MARVIN JOE REEVES,)
:
Appellant, (
:
vs.) Case No. 10865
:
STATE OF UTAH, (
:
Respondent.)

==========

BRIEF OF APPELLANT

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TABLE OF CONTENTS

STATUTES AND TEXTS

CASES CITED

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	:	
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	:	
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STATEMENT OF THE NATURE OF THE CASE

The appellant, Marvin Joe Reeves, appeals from his conviction of the crime of grand larceny upon jury trial in the District Court of Weber County, State of Utah.

DISPOSITION IN THE LOWER COURT

A complaint was filed against Marvin Joe Reeves on the 8th day of September, 1966, alleging that he did commit grand larceny with respect to property belonging to J. B. Asher. Trial was held in the District Court of Weber County on the 3rd day of February, 1967, and the jury returned the verdict of guilty on the charge of grand larceny. The

appellant was sentenced and committed to the Utah State Prison on the 14th day of February, 1966, in accordance with Section 76-38-6, Utah Code Annotated, 1953.

RELIEF SOUGHT ON APPEAL

The appellant submits that in view of the inconsistency of the identification of the appellant, as a result of the prior erroneous identification at a police "line-up," that his conviction on the charge of grand larceny must be reversed and a judgment of acquittal entered.

STATEMENT OF FACTS

J. B. Asher drove into the Big-B Cafe in Ogden, Utah, with his brother-in-law at approximately 1:00 a.m. on the 8th day of September, 1966. In the rear of the truck which they were driving was an industrial type buffer belonging to Mr. Asher, which he used in his janitorial service business. Mr. Asher and his brother-in-law went into the cafe for a cup of coffee.

There were in the parking lot at this time two truck drivers who were parked adjacent to one another

conversing through the windows of their trucks. These two men, Mr. Goettle and Mr. Whitaker, testified that they observed an automobile drive into the cafe parking lot and park near the truck of Mr. Asher (T. 53, 64). Three occupants got out of the car and went into the cafe. They testified further that another man, a negro, got out of the car and took a buffer and brush from Mr. Asher's truck, which Officer Clemens found to be too heavy to lift into his patrol car (T. 37). According to their testimony the man carried the buffer around the corner of the building and returned through an alley without the buffer (T. 54, 65). The truck drivers did not observe anyone arrested after the police arrived (T. 57). When Mr. Asher came out of the cafe he (T. 11), bumped into a person identified as the defendant who retorted: "What are you doing around here, man? or something like that" (T. 15). Mr. Asher's testimony is somewhat confusing at this point in that he testified that he first noticed Mr. Reeves as the accused was "looking in the windows" at the back of the cafe (T. 11), and

next testified that Mr. Reeves was "laying down in the back seat" (T. 19), of a "1953-1954 black Oldsmobile" (T. 14) and again a "1954-1955 green and white Oldsmobile" (T. 17). Mr. Asher's testimony, also conflicts somewhat with that of the two truck drivers as to the chronology of the events of their notifying him of the theft and the calling the city police.

The two drivers called Mr. Asher over to their trucks and told him what they had observed (T. 58, [illegible]. The police were called (T. 58, 65). Mr. Asher made a citizen's arrest based on the truck drivers' statements (T. 24). Officer Hawkins took charge of the investigation and a buffer was located by Officer Clemens around the corner and he wheeled it back to the parking lot because he was unable to lift it (T. 37), assisted by Officer Nielsen (T. 28). The person observed taking the buffer was identified as wearing no shirt by the two eye-witnesses, Mr. Goett[illegible] and Mr. Whitaker (T. 57, 67), but the man arrested was identified by Officer Clemens as wearing a T-shi[illegible]

(T. 43). There was blood found on the cord of the buffer (T. 37), but no blood tests were taken, even though such tests are routinely taken in the course of an investigation (T. 42). The failure to take the blood test and also the failure to take fingerprint tests were based upon an "oversight" by Officer Clemens because he was new in the police department and "did not realize the importance of these tests" (T. 31a). Evidence was offered that appellant had a cut on his hand (T. 31). The injury was first discovered by the police after the arrest at the police station (T. 31, 49). Officer Nielsen testified that the cut was on the top of the ring finger in back of the nail (T. 46), and not on the gripping area on the inside of the hand. There is no evidence that any blood stains were in the automobile in which appellant was found. The appellant told the officers that he received his injury while being searched and handcuffed by the arresting officer (T. 49).

Prior to the trial, the two eye-witness truck drivers, Mr. Goettle and Mr. Whitaker, were asked

to attend a police line-up for identification of the suspect. Both eye-witnesses picked out a man other than Reeves as the thief, to-wit: Mr. Holston, the brother-in-law of appellant (T. 59, 67).

It is from a conviction based upon these facts that the appellant prosecutes this appeal.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED ERROR IN NOT DIRECTING A VERDICT FOR APPELLANT SINCE THE EVIDENCE IDENTIFYING THE APPELLANT AS THE THIEF IS CONFLICTING AND INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTION.

The only eye-witnesses to the actual taking of the property, Mr. Goettle and Mr. Whitaker, two truck drivers from Montana, in this case were both present at a line-up conducted at the Weber County Jail. Both witnesses picked out the same man as the thief, which indicates that they were in agreement as to the general characteristics of the man whom they had observed in the act of taking the buffer. They identified a Mr. Thomas Holston of Ogden, who had an alibi for the night the alleged crime took place. The

fact of this extra-judicial identification was pointed out at the trial (T. 49, 67), and both witnesses admitted their failure to identify appellant in the line-up as the thief. Goettle never did make a positive in-court identification of appellant as the person whom Goettle saw commit the crime. Whitaker, on the other hand, made an in-court identification of appellant (T. 67). When this conflicting identification was pointed out to him, Whitaker explained the reason for his changed identification in the following colloqy:

> Q. It's because of his (district attorney's deputy) representation to you today when you have changed your mind, and now you say this is the man and not this one; is that correct?
>
> A. (Witness nods head up and down.)
>
> Q. And the very reason you have changed your mind is because someone told you that you made a mistake; isn't that true?
>
> A. Yes.

At the close of the prosecution's case there should have been a directed verdict for the defendant because of the lack of sufficient identification and the fact that there must reasonably have been doubt in the minds of the jury.

Extra-judicial and pre-trial procedures are regarded as being equally important as those events occuring in the courtroom, and the recent decisions provide for every protection at these extra-judicial proceedings. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 ALR 3rd 947 (1966); Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1964); United States v. Wade, 358 F. 2d 557 (5th Cir.), 87 S. Ct. 1926 (1967). The reason for providing these safeguards to those accused is that the outcome of the trial is very much dependent upon the results of these extra-judicial procedures. In the recent Wade case the Supreme Court observed the important role that testimony of a pre-trial lineup and identification plays in the trial, and ruled that every protection should be

afforded an accused to assure that his rights be preserved.

There is no contention here that there was anything improper in the lineup with regard to procedures and safeguards insuring for fair and impartial identification since Wade is not retroactive. On the contrary, it appears to have been fair and in observance of the safeguards suggested by the legal writers. Daniel G. Murray, The Criminal Lineup at Home and Abroad, Utah L. R. 1966: 610; Hall & Mueller, Criminal Law and Procedure, 910 (2d Ed. 1965). The appellant here contends that the extra-judicial identification should be given the recognition of importance and materially that these recent decisions have attributed to such identification. Chief Justice Traynor in People v. Gould, 354 P. 2d 865, 54 Cal. 2d 621, 7 Cal. Reptr. 273 (1963) stated that:

> "Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence if identity . . . . (E)vidence of an extra-judicial identification is admitted . . . because the earlier identification has greater probative value than an identification

made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witnesses mind." People v. Slobodian, 31 Cal. 2d 555, 559, 560, 191 P. 2d 1; United States v. Forzano (2nd Cir.) 19 F. 2d 687, 689; See People v. Hood, 140 Cal. App. 2d 585, 588, 295 P. 2d 525; People v. Bennett, 119 Cal. App. 2d 224, 226, 259 P. 2d 476, 4 Wigmore Evidence (3rd Ed. 1940) § 11 p. 208. (Emphasis added.)

A frequently cited dissenting opinion by J. Parke in the case of Blake v. State, 157 Md. 75, 145 ATT. 185, (1929) points out the evidentiory value of a properly conducted extra-judicial identification.

"The identification was the expression of the opinion of the witness, and it had much more evidentiory force . . . an identification at the trial when the witness is testifying has not the same weight, since, by that time, the witness would have come by force of intervening circumstances, to believe in the prisoner's identity . . . . The best evidence of identification is usually the first identification." (Emphasis added.)

The intervening circumstance in this case is the fact that an officer told Whitaker that he had "made a mistake" and had "identified the wrong man" (T. 38). The Supreme Court of Maryland has since the Blake case followed the opinion of J. Parke and expressly

overruled the Blake decision. In Basoff v. State, 208 Md. 643, 119 A. 2d 917 (1956) the Maryland Court held:

> ". . . the prior identification is admissible in evidence . . . a prior identification, considered in connection with the circumstances surrounding its making, serves to aid the court in determining the trustworthiness of the identification made in the courtroom."

See also, Judy v. State, 218 Md. 168, 146 Alt. 2d 20 (1958); and Johnson v. State, 237 Md. 283, 206 A. 2d 138 (1965). A recent Arizona court in State v. Taylor, 99 Ariz. 151, 407 P. 2d 106 (1965) summed up its position by stating:

> "(T)he modern rule is that an identification made prior to the trial is of greater significance than one made in the courtroom . . . . (W)e agree with the above statement of law." (Emphasis added.)

State v. Simmons, 63 Wash. 2d 17, 385 P. 2d 389 (1963); People v. Hagendorny, 272 App. Div. 830, 70 N.Y.S. 2d 511 (1947).

The state submitted the evidence of the prior inconsistent identification "the state is bound by its evidence and where it is directly contradictory . . . a conviction cannot stand." State v. Haynes, [illegible], 2 [illegible] P. 2d 300 (1963).

This court has allowed extra-judicial identification to be admitted as evidence at trial. State v. Owens, 15 Utah 2d 123, 388 P. 2d 797 (1964).

Appellant submits that if a prior identification of an accused at a lineup, which is inconsistent with a failure to identify at trial may be used as substantive evidence to sustain a conviction of the person identified, then the fact that someone other than the accused was picked out of the lineup in which the accused was present should be substantive evidence of a failure to identify. The same reasons and bases for considering the prior lineup better evidence than the trial identification exist. Certainly, if the extra-judicial identification may be used to prove identification, it should be allowed to prove non-identification.

It is as much a function of the judicial system to acquit the innocent as it is to convict the guilty. Every care should be taken to assure that there be no doubt of the defendant's guilt for a conviction. Eye witness identification is at best fallible and

care should be taken not to rely too heavily on weak eye witness identification. In the recent article by Daniel G. Murray, The Criminal Lineup at Home and Abroad, Utah L. R. 1966: 610, he states:

> "Almost all knowledgeable authorities agree that eye witness identification is the most unreliable form of proof.
>
> "Perhaps erroneous identification of the accused constitutes the major cause of the known wrongful conviction . . . . The police and prosecutor may work on an eyewitness by subtle and repeated questions, until he loses his initial uncertainty about a suspect and finally without hesitation, declares him the man who did the deed. Then at the trial this eye witness testifies so positively that cross-examination does not create any doubt in the jury's mind, and they believe the witness' testimony that the defendant was the culprit."

There are many cases of mistaken identification by an eye witness that have resulted in innocent persons being convicted. Borchard, Convicting the Innocent, Frank & Frank, Not Guilty. Wall, in his book, Eyewitness Identification in Criminal Cases, p. 26, he states:

> "The influence of improper suggestions upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor -- perhaps it is responsible for more such errors than all other factors combined."

In the Wade case the United States Supreme Court points out that:

> "The varogies of eye witness identification are well known; the annals of criminal law are rife with instances of mistaken identificatio . . . . The dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial and thus his susceptability to suggestion the greatest."

In this case Mr. Goettle, testified that he did not have an opportunity to observe the man whom the police arrested the night of the incident (T. 57) as "we went out looking for this thing, the buffer." The conflicting testimony regarding the thief's dress (T. 57, 67), and the apparel of the accused when arrested (T. 43), indicates the probability that the wrong person was arrested.

The problem of identification is made more difficult in this case by the fact that Reeves is colored and the two eye witnesses are white. It is generally agreed by sociologists and other behavioral scientists that persons of one race have difficulty in distinguishing members of another, especially where the identifier is not familiar with a general

cross section of the membership of the other race. F. Frankfurter in his book, The case of Sacco and Vanzetti, (1927), p. 31, states: "the old song 'All Coons Look Alike to Me,' represents a deep experience of human fallibility."

Other authorities have indicated that there is a fatal resemblence which negroes often have to one another in the eyes of a white man. Wilder and Wentworth, Personal Identification, p. 38 (1918). In Feingold, The Influence of Environment on Identification of Persons and Things, 5 J. Crim. L., C & P.S. 39, 50 (1914), the author states:

> "(it is) well known that, other things being equal, individuals of a given race are distinguishable from each other in proportion to our familiarity, to our contact with the race as a whole. Thus, to the uninitiated American, all Asiatics look alike, while to the Asiatic, all white men look alike."

In the recent book by Thomas Wall, Eye Witness Identification in Criminal Cases, p. 122 (1965), he states:

> "There is a much greater possibility of error where the races are different than where they are the same. Where they are different, there is more likelihood of error where the suspect

belongs to a minority group and the witness a majority group than there is in the opposite situation."

These arguments apply with force to this case. The two eye witnesses were white while the accused, Reeves, is a negro. The witnesses, Goettle and Whitaker, are from Montana, a state in which only .2% of the population is negro, thus their familiarity and exposure is limited.

Thus, in this case a situation exists where the defendant was arrested solely on the statements of the two eye witnesses, who agreed in every respect as to the general appearance of the thief. The police investigation, by "oversight" failed to take the routine tests, fingerprint and blood analysis, which would have proven the innocence of the defendant. Police officers testified that two of them "wheeled" the buffer back to the parking lot because it was too heavy to lift, yet, the two eye witnesses testified that the thief "carried" the buffer, while acting drunk, away from the area. Finally these same two eye witnesses, whose testimony is the only

link tying the defendant to the crime, failed to pick the defendant out of a police lineup, but instead agreed upon another man as the thief. After the lineup, but prior to trial, these eye witnesses were told they had "made a mistake" and "identified the wrong man". Later, at trial, Mr. Whitaker identified the defendant as the thief. When questioned concerning this on cross-examination, Mr. Whitaker admitted that the very reason he changed his mind "was because someone told (him) that he made a mistake" (T. 70).

The testimony of these two eye witnesses should reasonably have left a doubt in the minds of the jurors because of the varogies and inconsistencies in their testimony and identification. The evidence being as consistent with innocence as guilt requires reversal.

CONCLUSION

The instant case was allowed to go to the jury even though there was no positive, consistent identification of the appellant by the eye witnesses

which could support guilt beyond a reasonable doubt. The property taken by the thief was not found in the possession of the appellant. Indeed, the major evidence as to positive identification of the thief was not used by the police because they failed either to take a fingerprint test on the stolen buffer or to analyze the blood found on the buffer to determine if it could or could not have been the appellant's. It is apparent that the reason appellant was tried in the face of the extra-judicial non-identification was that the other evidence was destroyed through incompentency and oversight of a new police officer in charge of the investigation. Justice will only be served in this case by reversing the conviction and allowing the appellant to resume a life of a free man.

Respectfully submitted,

RONALD N. BOYCE